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No. 84-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, et al.,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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November 29, 1984

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE.....1

INTRODUCTION AND
SUMMARY OF ARGUMENT.....2

ARGUMENT
A MUNICIPALITY MUST REFUSE TO PERMIT PUBLIC LAND TO BE USED FOR THE DISPLAY OF RELIGIOUS SYMBOLS WHICH WOULD BE VIOLATIVE OF THE ESTABLISHMENT CLAUSE IF DISPLAYED BY THE MUNICIPALITY ITSELF WHEN, AS HERE, SUBSTANTIAL DANGER EXISTS THAT THE DISPLAY WILL APPEAR TO LEND THE IMPRIMATUR OF THE STATE TO RELIGION.....8

CONCLUSION.....23

TABLE OF AUTHORITIES

Cases — Pages

ACLU v. City of Birmingham, 588 F. Supp. 1337 (E.D. Mich. 1984).....9

ACLU v. Rabun County Chamber of Commerce, 510 F. Supp. 886 (N.D. Ga. 1981), aff'd and remanded, 678 F.2d 1379 (11th Cir. 1982), aff'd and remanded per curiam on reh'g, 698 F.2d 1098 (11th Cir. 1983).....6

Abington School District v. Schempp, 374 U.S. 203 (1962).....14

Anderson v. Laird, 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972).....14

Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966).....13

Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).....4

Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).....13

Clark v. Community for Creative Non-Violence, 82 L.Ed.2d 221 (1984).....11

Fowler v. Rhode Island, 345 U.S. 67 (1945).....4

Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980), cert. denied, 451 U.S. 987 (1981).....15

Hague v. CIO, 307 U.S. 496 (1939).....16

Heffron v. ISKCON, 452 U.S. 640 (1981).....15

Larkin v. Grendel's Den, 459 U.S. 116 (1982).....2, 3

Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977).....5

Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117, op. withdrawn, 459 P.2d 222 (Or.), further reh'g, 463 P.2d 360 (Or. 1969), cert. denied, 397 U.S. 1042 (1970), vacated under changed circumstances sub nom. Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976).....6

Lynch v. Donnelly, 79 L.Ed.2d 604 (1984).....passim

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, which raises the question of whether private persons may compel a municipality to permit the display of a Nativity scene measuring nine feet by six feet by three feet on public land for an extended period of time during the Christmas season, illustrates a tension between the Free Speech Clause and the Establishment Clause of the First Amendment.

The Court's approach in cases involving a similar tension between the Free Exercise and Establishment Clauses has been to avoid a doctrinal formulation which subordinates one clause to another. E.g., Larkin v. Grendel's Den, 459 U.S. 116 (1982); Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972). See Welsh v. United States, 398 U.S. 333, 356-57 (1970) (Harlan, J., concurring). Instead, the Court has sought a resolution which, to the fullest

extent possible, respects the core values underlying each clause. Compare, e.g., Larkin v. Grendel's Den, supra, and Stone v. Graham, 449 U.S. 39 (1980), with Widmar v. Vincent, 454 U.S. 263 (1981). Such an approach, amici believe, is the proper method of resolving this case.

Respect for the core values of the Free Speech Clause compels a recognition that speech about religious themes is clearly entitled to First Amendment protection. Widmar v. Vincent, supra. Moreover, respect for the communicative significance of symbols compels a recognition that the display of religious symbols is highly protected communicative activity precisely because symbols are often a more powerful method of communication than purely verbal speech. Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969);

Stromberg v. California, 283 U.S. 359 (1931).

Where, however, the display of religious symbols on public land poses a danger of the appearance of state endorsement of the religious message, respect for the core values of the Establishment Clause compels a recognition that a municipality may (and in certain circumstances must) decline to permit certain sectarian religious displays on public land.

In those settings where the appearance of government endorsement of religion cannot be demonstrated by articulable facts, no countervailing Establishment Clause concern exists, and the Free Speech Clause fully protects the private display of religious symbols on public property. Widmar v. Vincent, supra; Fowler v. Rhode Island, 345 U.S. 67 (1953); Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); O'Hair v.

Andrus, 613 F.2d 931 (D.C. Cir. 1979).

Thus, in Widmar v. Vincent, supra, the use by a student group of a university classroom for religious activities prior to the opening of the school day was deemed protected speech precisely because, in a university setting, permitting religious speech in one unused classroom could not reasonably be perceived as an endorsement of religion. Similarly, in O'Hair v. Andrus, supra, permitting the celebration of a Papal Mass on the Mall was deemed permissible because, given the obvious lack of an appropriate alternative site, permitting the use of public land could not fairly be viewed as anything more than religious toleration.[1]

Conversely, when the risk of an

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[1] A fortiori, when private religious speech takes place on private property, no threat of an appearance of public endorsement exists. Accordingly, the private display of religious symbols on private land is fully protected by Free Speech principles. Cf. Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977).

appearance of government linkage with religion is clear, as it is in the context of permanent or semi-permanent displays by private persons of religious symbols on public land, respect for Establishment Clause values would compel -- not merely justify -- a prohibition on the displays.

Thus, in ACLU v. Rabun County Chamber of Commerce, 510 F. Supp. 886 (N.D. Ga. 1981), aff'd and remanded, 678 F.2d 1379 (11th Cir. 1982), aff'd and remanded per curiam on reh'g, 698 F.2d 1098 (11th Cir. 1983), and Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117, op. withdrawn, 459 P.2d 222 (Or.), further reh'g, 463 P.2d 360 (Or. 1969), cert. denied, 397 U.S. 1042 (1970), vacated under changed circumstances sub nom. Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976), courts ruled that the permanent display of privately owned crosses on public land constituted a violation of the

Establishment Clause. See also Stone v. Graham, 449 U.S. 39 (1980) (per curiam); cf. Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953) (private distribution of Gideon Bibles on school property violates Establishment Clause), cert. denied, 348 U.S. 816 (1954).

Where, as here, a municipality has determined that a given religious display on public land for a two-week period during the Christmas season would be destructive of Establishment Clause values because it would be perceived by many as improperly linking religion and government, the imperative to respect Establishment as well as Free Speech values argues that the municipality's judgment be upheld, since the judgment was based on an articulable set of facts demonstrating a substantial danger to Establishment Clause values. Indeed, given the factors discussed infra at 18-23, amici

believe that were Scarsdale to have permitted the display, it would have been in violation of the Establishment Clause.

ARGUMENT

A MUNICIPALITY MUST REFUSE TO PERMIT PUBLIC LAND TO BE USED FOR THE DISPLAY OF RELIGIOUS SYMBOLS WHICH WOULD BE VIOLATIVE OF THE ESTABLISHMENT CLAUSE IF DISPLAYED BY THE MUNICIPALITY ITSELF WHEN, AS HERE, SUBSTANTIAL DANGER EXISTS THAT THE DISPLAY WILL APPEAR TO LEND THE IMPRIMATUR OF THE STATE TO RELIGION

In Lynch v. Donnelly, 79 L.Ed.2d 604 (1984), this Court ruled that the inclusion of a creche by a municipality in a comprehensive holiday display including numerous traditional secular symbols of the Christmas season, such as Christmas trees, reindeer, Santa Claus, banners, toys and colored lights, neither evinced a purpose to advance religion nor had the forbidden effect of endorsing religion. Accordingly, this Court declined to override the municipality's decision that display of the creche would not

violate Establishment Clause values. In Lynch, both the Chief Justice and Justice O'Connor, concurring, stressed the fact-bound nature of the Court's decision. Lynch v. Donnelly, 79 L.Ed.2d at 608, 614, 622-23. Each noted that government displays which treated religious symbols not merely as one among many symbols of the holiday season, but as an undue expression of the holiday's religious significance, would cross the line from neutrality to endorsement and, thus, would violate the Establishment Clause. Not surprisingly, therefore, in the wake of Lynch, lower courts have enjoined municipal displays which have unduly emphasized the religious nature of the holiday. See, e.g., ACLU v. City of Birmingham, 588 F. Supp. 1337 (E.D. Mich. 1984).

Respondents candidly concede that, unlike the display in Lynch, the display at issue in this case consists solely of a

sectarian religious symbol and is not part of a general attempt to display the traditional symbols of the holiday season -- secular and religious alike. Pet. App. 49a n. 14. Moreover, they concede that the use of public land is indispensable to the "ecumenical" content of their message that Christmas is a Christian religious holiday, amply justifying the district court's finding that "an aura of Village approval" of their religious message is precisely what respondents sought to convey. Pet. App. 57a.

Given the emphasis placed by the Lynch majority on the association of the creche with secular elements in holding that the display in that case had neither the purpose nor effect of endorsing religion, it seems clear that if the Village of Scarsdale sought to display the creche sought by respondents as an "ecumenical" symbol of Christmas to remind its residents that Christmas remains a

Christian holiday, Scarsdale would undoubtedly violate the Establishment Clause. The issue posed by this case is whether a private group can compel Scarsdale to permit the erection of a creche on public land, designed to convey precisely such a sectarian message, despite Scarsdale's fear that the display will be perceived as government endorsement of a sectarian view of Christmas.[2]

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[2] Thus, this case does not involve the power of a municipality to restrict speakers engaged in communicative activity that does not implicate or endanger Establishment Clause values. It is the existence of two clauses of the First Amendment -- Free Speech and Establishment -- tending in different directions that gives this case its uniquely difficult cast. Were the speech at issue in this case not calculated to erode Establishment Clause values, the public forum analysis of the Second Circuit would, amici believe, be fully correct. In particular, we do not agree with the petitioners that government, without any rules and on the basis of vague and ill-defined interests, has discretion to pick and choose among those non-religious symbols which Americans may display in public fora. To be sure, there may be a role for time, place, and manner regulations; but Scarsdale has not seen fit to promulgate any. Compare Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), with Clark v. Community for Creative Non-Violence, 82 L.Ed.2d 221 (1984).

In effect, this case poses the obverse of Lynch. In Lynch, the Court upheld a municipal decision that a given display by a municipality would have neither the purpose nor effect of appearing to place the imprimatur of the state on the Christian doctrine of Divine Birth. In this case, a municipality has made a contrary decision, fearing that certain religious displays on public land, even if privately sponsored, would appear to place the prestige of the government behind a given sectarian message.

Amici believe that while the private display of religious symbols on private property is entitled to full protection under the Free Speech Clause, and while private religious speech on public property is undoubtedly entitled to substantial First Amendment protection, the Village of

Scarsdale retains power to safeguard Establishment Clause values by declining to permit an overtly religious display on public land for an extended period of time under circumstances posing a substantial danger of an appearance of religious endorsement. Cf. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 509 (1969); compare, e.g., Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (cited approvingly in Tinker; finding "substantial risk of disruption" test not met), with Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966) (also cited in Tinker; finding substantial risk of disruption).

Of course, not every display of a religious symbol on public land carries with it a danger of appearing to place the imprimatur of the State on religion. For example, where a religious display takes place in the context of a religious

observance utilizing public land as the only convenient gathering place, as in O'Hair v. Andrus, supra, the danger of an appearance of government endorsement of religion is not sufficiently great to implicate Establishment Clause values.[3] As in O'Hair, when no convenient private site exists for a given religious display, permitting public space to be utilized for the display should be perceived by any reasonable observer not as appearing to endorse religion, but as an understandable attempt to permit the free exercise of religion. O'Hair v. Andrus, supra.[4] Similarly, when a religious event

[3] The ACLU filed a brief in support of the federal government in O'Hair, arguing that allowance of the open-air Papal Mass on public property in that case was required by the free speech clause and raised no substantial risk of governmental imprimatur. State-supported chaplains in the military and in prisons are permissible for much the same reason. See, e.g., Abington School District v. Schempp, 374 U.S. 203, 296, 306 (1962) (concurring opinions); id. at 309 (dissenting opinion); Anderson v. Laird, 466 F.2d 283, 298 (D.C. Cir.) (Leventhal, J., concurring), cert. denied, 409 U.S. 1076 (1972).

takes place in a public forum in the context of numerous contemporaneous secular uses, the danger of an appearance of endorsement is insufficient to justify a limitation on religious speech. Widmar v. Vincent, supra; Heffron v. ISKCON, 452 U.S. 640 (1981). Thus, religiously oriented events such as marches, demonstrations, leafletting, and the like taking place in a public forum would raise no substantial or even colorable risk of imprimatur.

Where, however, a private religious display appropriates a public space for an extended period of time, neither a pro-forma

[4] Of course, where the government adds valuable services to religious speech beyond those granted to other non-religious speakers, the Establishment Clause is violated. Thus, in Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980), cert. denied, 451 U.S. 987 (1981), the Court agreed (at the ACLU's urging) that the city properly allowed a Papal Mass on public property, but held that the city violated the First Amendment by spending more than $200,000 for platforms for the Mass, religious choir, and other extraordinary assistance.

disclaimer nor the concept of public forum removes the very real danger that members of the public will perceive the display as placing the imprimatur of the state on religion in general, to say nothing of the particular dogma involved. Given the obvious concerns of the Founders, such a danger of appearing to endorse religion justifies, and in some circumstances obligates, a municipality in refusing to turn over its public spaces for such extended religious displays, especially when fully adequate private sites are available.

Thus, although the streets and parks have "time out of mind" been places open to the exercise of free speech, Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J.), surely the dominant churches in every city, village and hamlet throughout the nation may not compel, on free speech grounds, their towns to display large lighted crosses in

public squares and parks at the center of town. To put it another way, the Establishment Clause precludes American cities from being forced to emulate Rio de Janeiro's public statue of Christ atop Sugarloaf Mountain. Where, as here, religious adherents eschew available private spaces for their display and, instead, insist upon displaying religious symbols for an extended period of time on public property not subject to a variety of complementary secular uses, the perception (and, as the district court found, the intention Pet. App. 57a,) is not one of fostering free exercise, but rather of insisting upon an appearance of public endorsement.

The line between religious speech that is absolutely protected by the Free Speech Clause and religious speech that is subject to this minimal degree of regulation to avoid violating the Establishment Clause is

undoubtedly a subtle one. However, the adoption of subtle lines is necessary to preserve both sets of values embedded in the Establishment and Free Speech Clauses of the First Amendment.

On the record in this case, the line is not difficult to draw. Indeed, were Scarsdale to have permitted the display, it would have violated the Establishment Clause.

First, the display is avowedly and unabashedly sectarian. Unlike the display at issue in Lynch, no argument exists that the Scarsdale display is merely part of a general attempt to celebrate the holiday season by exhibiting its many symbols. The Scarsdale nativity scene stands unadorned by any secular trappings. Cf. Lynch v. Donnelly, supra.

Second, the subjective intention of the respondents is to convey a sectarian message. It is the very purpose of the

display to remind the residents of Scarsdale that, despite governmental recognition as a national secular festival, Christmas remains a Christian holiday.

Third, respondents' decision to insist upon a public platform for the creche, despite the existence of numerous private alternatives, is an attempt to assert the official status of Christmas as a national holiday of Christian dimensions; not merely a secular celebration of shared Western values.

Fourth, the proximity of the creche to Scarsdale's War Memorial, a public monument erected and maintained by the Village, powerfully reinforces the risk of an appearance of governmental endorsement of the creche's sectarian message.

Fifth, the dearth of contemporaneous secular events utilizing the public land in question increases the risk of an appearance of endorsement. Unlike the numerous

contemporaneous secular uses which surrounded the religious speech in Widmar and the contemporaneously displayed secular objects in Lynch, respondents' display stands alone, thus increasing the danger of public equation of extended presence with endorsement.

Sixth, the existence of numerous obvious alternative private sites increases the danger of an appearance of government endorsement. Unlike Widmar and O'Hair, where no alternative private sites existed, the use of public land for an extended religious display cannot be explained as a neutral act of toleration. Rather, it will be perceived by many -- indeed, respondents hope that it will be so perceived -- as an expression of government support for religion.

Seventh, the unfortunate history of religious polarization in Scarsdale over the issue of whether to permit the creche makes it clear that a substantial segment of the

community, both for and against the display, views the decision whether to permit it as an indication of government support for the religious message involved. Unlike the situation in Lynch, the creche issue had divided Scarsdale on religious lines for over a decade before the Village trustees sought to end the division by transferring the display to private premises, and well before this litigation commenced.

Eighth, the lack of pre-existing rules and regulations in Scarsdale governing access to public land for free speech purposes renders the decision to permit or to deny the display an ad hoc exercise in subjective decision-making, making it all the more likely that a decision to permit the creche would be viewed as an expression of government support for its message. Were areas of Scarsdale's parks set aside as genuine public fora and utilized as such by

the community, the danger that a religious display, as one of a multitude of contemporaneous secular uses, would be perceived as an endorsement would be materially decreased.

Ninth, the size, duration, and timing of the display, coupled with the lack of a meaningful disclaimer,[5] exacerbated the risk that members of the public would view the display as a government endorsement of the Christian version of Christmas.

Moreover, the decision to ban the display frees Scarsdale from the very difficult question of whether simultaneous and divisive private displays of other sects' religious symbols -- to say nothing of

[5] The display at issue in this case stands in the midst of a traffic circle and is designed to be viewed from an automobile. Moreover, the display is lit and is designed to be viewed at night. While it is doubtful that any disclaimer would be sufficient to eliminate the appearance of endorsement, surely an unlit sign which is not visible from a passing automobile was insufficient.

displays by agnostics and atheists -- must also be permitted.

In view of the confluence of these factors and given the need to accommodate both Establishment and Free Speech values, Scarsdale's decision to confine the display to equally prominent private spaces was not only a permissible exercise of power; it was a required one.

CONCLUSION

For the above-cited reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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